BANK BUMIPUTRA MALAYSIA BERHAD

v.

JIMMY WONG SZE PHIN

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[CIVIL APPEAL NO. T (12) 9 OF 1994]
15 OCTOBER 1994

PRACTICE & PROCEDURE: *Appeal against dismissal of summons for want of prosecution - Delay of more than 5 1/2 years in proceeding with action - Sessions Court Judge mentioning case on own initiative for purpose of causing appellant to show cause why the action should not be struck out - Application of O.28 rr. 2(1) & 3 of the Subordinate Courts Rules 1980 - Whether appellant's delay excusable - Whether respondent seriously prejudiced by the delay - Whether the decision of the Sessions Court Judge correct.*

This was an appeal against the dismissal of the appellant's summons for want of prosecution. The learned Sessions Court Judge had issued a notice of hearing to the parties on his own initiative pursuant to O. 28 r. 2(1) of the Subordinate Courts Rules 1980 (SCR 1980) and mentioned the case for the appellant to show cause why the summons should not be struck out as the matter had lay dormant for over 5 1/2 years after the respondent filed his defence. By affidavit the appellant explained that the failure to take out the notice for directions for trial was due to the difficulty in computing manually the account outstanding. The respondent replied that the appellant's reasons were unreasonable having regard to their resources as bankers. He further claimed the delay had prejudiced him in that his memory was likely to be affected due to the lapse of time and the fact that all his documents relating to the claim had been destroyed in a fire.

The issues before the Court were whether the delay was excusable, whether such delay gave rise to a substantial risk that it was not possible to have a fair trial of the issues in the action or whether the respondent was seriously prejudiced by the delay.

Held:

[1] It was clear that the respondent had been guilty of inordinate and inexcusable delay. Nothing was done to have the case set down for trial for some 5 1/2 years. In the age of the microprocessor the most difficult sums take not even minutes but seconds. It is pure balderdash to say that it was complex and difficult to manually reckon the amount owing to the respondent. In any event, no explanation was given as to the alleged complexity and difficulty. There was absolutely no excuse for the delay.

[2] The learned Session Court Judge had not made a decision as to how the respondent's assertions could give rise to a substantial risk that it was not possible to have a fair trial of the issues in the action. Clearly, the issue was only whether the appellant could prove its claim by documentary evidence. It was not pointed out at the lower Court what dispute and as regards what sums the resolution of which was dependant on oral as compared to documentary evidence. The respondent had alleged that whatever documents he had relating to this matter was lost in a fire but it was never shown nor demonstrated to the Court below how such documents could be relevant to the question of the computation of the amount of indebtedness due from the respondent to the appellant. It cannot be seen how such a bare assertion could constitute proof of serious prejudice.The long lapse of time alone in this case cannot be sufficient for the Court to conclude that there is a serious risk that a fair trial is no longer possible because the evidence in this case will almost entirely be documentary which no passage of time can erase the record

and which memory has no part to play in its production. If the documentary evidence cannot be produced, the party prejudiced would be the appellant, not the respondent. The learned Sessions Court Judge should therefore have found that there was no substance in the contention of the respondent.

[Appeal allowed. Order of the Sessions Court Judge set aside with costs to the appellant]

Cases referred to:
Toh Hock Thye & Ors. v. Tob Chwee Biow [1982]1 MLJ 152 ***(foll)***
Vasudevan v. Damodaran & Anor. [1981] 2 MLJ 150 ***(foll)***
United Malayan Banking Corporation Berhad v. Palm & Vegetable Oil (M) Sdn Bhd & 3 Ors [1994] 3 MLJ 73 SC; *[1994] 2 AMR 32:1653, at p. 1662)* ***(foll)***
Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 AMR 24: 1232 SC ***(refd)***

Legislation referred to:
Subordinate Courts Rules, 1980, O. 11 r. 5(1), O. 28, rr. 2(1) 3, O. 5 r. 11

For the appellant - Lucy Lo; M/s. Hiew & Chin
For the respondent - M/s. P.K. Lim & Co. (absent)

JUDGMENT

Ian H.C. Chin J:
The learned Sessions Judge had on 26 July 1994 ordered the summons of the appellant against the respondent to be dismissed because, according to the Sessions Judge, the appellant was guilty of inexcusable and inordinate delay which prejudiced the respondent. This decision came about as a result of the following events.

On 1 June 1994, the Sessions Court issued a "Notice of Hearing" to the parties and fixed 29 June 1994 for "mention". It was at this hearing on 29 June 1994 that the learned Sessions Judge indicated to the parties that he wanted the appellant to show cause why the summons should not be struck out and the hearing was adjourned to 26 July 1994. By that time various affidavits had been filed on behalf of the parties. On behalf of the appellant (the plaintiffs in the Court below), the following excuse was offered by its manager for the failure to take out the notice for directions for trial, *viz*.:

> 3) The reason for the delay in filing the application under O. 26A and O. 14 was owing to the complexity and difficulty in computing manually the account outstanding for the period from 22 August 1983 to 30 September 1988.

On 'behalf of the respondent an affidavit was filed containing almost entirely of submissions and contentions save for 3 paragraphs which I reproduce, *viz*.:

> 11. .... It is incomprehensible for the plaintiffs to advance such a reason for the delay having regard to their resources as bankers and it is not unreasonable for me based on such reasons to construe that the plaintiffs were not even sure of the question of their claim before issuing proceedings against me. Their claim against me as such, by virtue of their admission, is premature in law and it is unreasonable for the action to hang over my head indefinitely.
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> 12. Further, the plaintiffs' delay has given rise to a substantial risk that it is not possible to have a fair trial of the issues in the action and that such delay have indeed prejudiced me. The limitation period for the plaintiffs to file afresh has already expired.
>
> 13. Due to the long lapse of time, my memory in the matter is likely to be affected as any proposed amendments to my existing defence is dependent on the plaintiffs furnishing me with full and better particulars of their claim. Whatever documents that I have relating to

a the plaintiffs' claim and or to rebut the same and all pertinent correspondence relating to the claim and/or loans which are in my possession and kept in my residence at TB3457, Taman Kafar, Jalan Sin On, 91000 Tawau, Sabah, Malaysia have been destroyed in a fire at my residence on 3 September 1991. As proof of the fire, a copy of the agreement by Maphilindo Adjusters & Investigators Sdn Bhd dated 29 October 1991 is now produced and shown to me marked as exhibit "JW-3".

b The summons that was struck out was issued on 27 June 1988 against the respondent and a Buji bin Ganjai for the sum of RM63, 367.50 which the appellant lent to the respondent. Judgment in default had already been entered against the said Buji bin Ganjai on 24 August 1988. As for the respondent (referred to as the 1st defendant), he disputed the claim and the relevant part of his defence reads

c 2. The 1st defendant admits having taken an overdraft amounting to RM40,000 from the plaintiffs but denies that he is indebted to the plaintiffs in the sum of RM63,367.50 inclusive of other monies and interests being the total sum outstanding as at 1 January 1988 as alleged under paragraph 5 of the indorsement of claim and would require strict proof thereof.

3. The 1st defendant further avers that the plaintiffs have failed, omitted, neglected or otherwise refused to fumish to the 1st defendant with full particulars or a breakdown of their claim including the mode of computation thereof contrary to O. 18, r. 12(l) of the Rules of
d the High Court, 1980 as to the requirement of giving particulars of claim.

It was upon the history and the affidavit evidence which I have related that the learned Sessions Judge struck out the summons against the respondent. The gist of his judgment is that he has the power to do what he did under O. 5 3, r. 11 or O. 28, r. 3 of the Subordinate Courts Rules, 1980. He came to the conclusion that the respondent had "raised a substantial risk that it is not
e possible to have a fair trial and that such delay has seriously prejudiced" him.

The Law

Though it was submitted in the Court below by the then Counsel for the appellant, that the learned Sessions Judge had no jurisdiction to, on his own initiative, mention the present case for the purpose of striking it out unless the appellant can show cause to the contrary, Miss Lucy Lo,
f Counsel for the appellant, rightly conceded that the learned Sessions Judge had the power to do so. As for fixing the case for hearing, including mention, it is clearly within the power of the learned Sessions Judge to do so under O. 28, r. 2(l) of the Subordinate Courts Rules, 1980. As for the power to strike our the summons, the learned Sessions Judge is again correct in saying that O. 28, r. 3(3) empowers him to do so. For ease of reference the whole of O. 28, r. 3 is reproduced here

g 3. (1) Where the hearing of a cause or matter is adjourned generally, any party may apply to have a day fixed for the hearing of it.

(2) The notice must be served not less than 14 days before its return day, unless the Court otherwise orders.

(3) Where no application is made under paragraph (I) within 12 months after the day on which the hearing of the cause or matter was adjourned generally and unless any party applies to
h have the hearing again adjourned and the application is granted, the cause or matter shall be struck out.

(4) Paragraph (3) of this rule shall not apply to any cause or matter the hearing of which was adjourned generally before the coming into force of these rules.

The hearing of this case was fixed on 24 August 1988 where it was obviously adjourned to allow
i the respondent to file his defence. The respondent filed his defence on or about 19 September 1988. That was the last that was heard of this action against the respondent until more than 5

1/2 years afterwards when the learned Session Judge, as mentioned earlier, on his own initiative mentioned this case for the purpose of causing the appellant to show cause why the action should not be struck out. There should be no doubt as to the correctness of the view of the learned Sessions Judge as regards his power to mention a case for the purpose of hearing the parties as to why the summons should not be dismissed if one adverts to the case of *Toh Hock Thye & Ors. v. Tob Chwee Biow* [1982]1 MLJ 152 (which the learned Sessions Judge also relied on) where it is said, at p. 153 thus

> Before 12 November 1976 dismissal of a plaintiffs action for want of prosecution could only be ordered by the Court upon the application by the defendant to that effect. The Court then had no power to pull up a slumbering plaintiff who had done nothing to bring the case to a speedy trial. Since that date, however, the Rules of the Supreme Court 1975 were amended to enable the Court or the Judge to issue a notice to show cause to the parties requiring the plaintiff to explain why his action should not be dismissed for want of prosecution (O. 36 r. 11 A(2) of the Supreme Court Rules 1957 and now O. 34 r. 8(2) of the Rules of the High Court 1980). The present position therefore is that a plaintiff's action could be dismissed for want of prosecution either on the application of the defendant or on a notice to show cause to him issued by the Court, but the principle which guides the Court in determining the question whether the action should be dismissed or not for want of prosecution remains the same.

One of the principles guiding dismissal is that the plaintiff or his lawyer is guilty of such an inordinate and inexcusable delay that the defendant has been prejudiced by it (see *Vasudevan v. Damodaran & Anor.* [1981] 2 MLJ 150). What was decided and said in *Toh Hock Thye & Ors. v. Tob Chwee Biow's* case and which I have just cited applies to the said O. 28 r. 3 of the Subordinate Court Rules which also serve to confer on the Court the power to dismiss a case on its own initiative.

Conclusion

It is clear that the plaintiff has been guilty of inordinate and inexcusable delay. Nothing was done to have the case set down for trial for some 5 1/2 years. It is amazing that a bank with the stature of the plaintiff would proffer the nonsensical excuse that the delay was due to the, quoting the plaintiff's words again, "complexity and difficulty in computing manually the account outstanding for the period from 22 August 1983 to 30 September 1988". In the age of microprocessor the most difficult of sums take not even minutes but seconds. It is pure balderdash to say that it is complex and difficult to manually reckon the amount owing by the respondent. In any event, no explanation was given as to the alleged complexity and difficulty. There is absolutely no excuse for the delay. What remains to be decided is whether such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or whether the respondent was seriously prejudiced by the delay. The law has recently been re-stated by the Supreme Court (as it was then known) in *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oil (M) Sdn Bhd & 3 Ors* [1994] 3 MLJ 73 SC; [1994] 2 AMR 32:1653, at p. 1662, a case cited by Miss Lucy Lo, where it is said:

> From the authorities, it is settled law that there are two distinct, though related circumstances in which an action may be dismissed for want of prosecution, namely,
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> (a) when a party has been guilty of intentional and contumelious default; and
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> (b) where there has been inordinate and inexcusable delay in the prosecution of the action (*Allen v Sir Alfred McAlpine & Sons Ltd, supra,* approved in *Birkett v James, supra,* and followed in *Vasudevan v Damodaran & Anor*. [1981] 2 MLJ 150), On the question of inordinate and inexcusable delay, the power should be exercised only where, according to Lord Diplock, the Court is satisfied

(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and

(b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

On the question of prejudice which must be "serious", we would rely on the passage in the **Supreme Court Practice** 1993, *supra*, (p. 472):

> This is a matter of fact and degree and has been discussed in *Allen McAlpine* [1968] 2 QB 229; [1968] 1 All ER 543, CA and in a large number of reported cases. The effect of the lapse of time on the memory of witnesses or, in the course of such time of their death or disappearance are the most usual factors. Their importance depends upon the circumstances, the issues and the other evidence that can be given. Thus the lapse of time may be very prejudicial if the circumstances of an accident or oral contracts or representations are in issue, but is of much less importance in a heavy, well documented commercial action (*National Insurance Guarantee Corp Ltd v. Robert Bradford & Co Ltd* [1970] 114 SJ 436 CA). But prejudice is not limited to matters affecting proof, a defendant, particularly a professional man, may be made prejudiced by having an action hanging over his head indefinitely (*Biss v Lambeth, Southwark and Lewisham Health Authority (Teaching)* [1978] 1 WLR 382, [1978] 2 All ER 125 CA.

Has the learned Sessions Judge then applied the correct tests just referred to in coming to his decision ?. In this regard, this is what the learned Sessions Judge said :

> In the present case, it was conceded by Counsel for the plaintiffs that the limitation period for this action had already expired. Further, no satisfactory explanation has been advanced as to why the plaintiff had remained inactive for almost 6 years. On the other had, the [1st] defendant in his affidavit claimed that the plaintiff's delay has given rise to a substantial risk that it is not possible to have a fair trial of the issues in the action and that such delay has indeed prejudiced him.
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> After due consideration of the matters raised in the affidavits and after having heard arguments from both sides, I formed the view that the delay by the plaintiffs has indeed raised s substantial risk that it is not possible to have a fair trial and that such delay has seriously prejudiced the [1st] defendant. The plaintiffs have kept this suit in abeyance for almost 6 years and when called upon to do so, they could give no satisfactory explanation for their inactivity. They were clearly guilty of inordinate and inexcusable delay. It would therefore be most unjust to allow this dilatory conduct to continue against the defendant not unlike the ominous spectre of the proverbial sword of Damocles hanging over his head for an uncertain period. The Courts should no longer tolerate such supine stance adopted by dilatory plaintiffs so as to permit and perpetuate injustice caused to defendants by such sleeping plaintiffs.
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> I therefore had no hesitation in exercising this salutory power of the Court and accordingly dismissed with costs the plaintiff's action for want of prosecution.

It will be observed that the learned Sessions Judge has not made a decision regarding the assertions of the respondent, which I again quote, :

> 13. Due to the long lapse of time, my memory in the matter is likely to be affected as any proposed amendments to my existing defence is dependent on the plaintiffs furnishing me with full and better particulars of their claim. Whatever documents that I have relating to the plaintiffs' claim and or to rebut the same and all pertinent correspondence relating to the claim and/or loans which are in my possession and kept in my residence at TB3457, Taman Kafar, Jalan Sin On, 91000 Tawau, Sabah, Malaysia have been destroyed in a fire at my residence on 3 September 1991. As proof of the fire, a copy of the agreement by Maphilindo Adjusters & Investigators Sdn Bhd dated 29 October 1991 is now produced and shown to me marked as exhibit "JW-3".

There was no decision as to whether the assertions in the just quoted paragraph of the respondent's affidavit can, and how it can, give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the respondent. This has the result of rendering the decision of the learned Sessions Judge a bare one. In such a case the position to be taken by an appellate Court is stated by the Supreme Court, also very recently, in *Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 AMR 24:1232 SC and which is that the appellate Court can either support or vary or reverse the decision of the lower Court even though it is a matter of discretion. It must be borne in mind what the issues are in this case. I have at the outset generally stated the plaintiffs claim to be one of money lent to the respondent. The the claim is more particularly stated in clause 4 of the endorsement of claim where it is alleged that the claim arose under a written agreement, the relevant clause of which was reproduced in the endorsement of claim and which reads:

> The 2nd defendant and/or the 1st defendant will on demand pay to the plaintiff all sums of money which are now or shall from time to time or at any time hereafter be due or owing by the 1st defendant to the plaintiff anywhere on banking account or any other accounts current or otherwise or in any manner whatsoever including the balance for the time being owing for or in respect of cheques bills notes drafts or other negotiable instruments accepted paid or discounted for and on behalf of the 1st defendant or for any other payments loan credits or advances made to or for the use or accommodation or on behalf of the 1st defendant whether alone or jointly with another or others pursuant to or in respect of or under any guarantee or letter or credit given established or opened by the plaintiff for the 1st defendant or and contracts for the forward delivery of goods bills or specie or in respect of any other banking facilities whatsoever whether or not given upon or under trust receipts or other security whatsoever or otherwise howsoever to an aggregate sum of (RM40,000) together with interest thereon at the rate of eleven per centum (11%) per annum with monthly rests...

The respondent, it will be recalled and to quote his defence, "admits having taken an overdraft amounting to RM40,000 from the plaintiffs but denies that he is indebted to the plaintiffs in the sum of RM63,367.50.." The other paragraph of the defence, again it will be recalled, merely complains that the "full particulars or a breakdown of their claim including the mode of computation thereof contrary to O. 18, r. 12(1) of the Rules of the High Court, 1980, as to the requirement of giving particulars of claim".

Clearly, the issue is only whether the appellant can prove by documentary evidence that the money which they are claiming arose out of the agreement referred to above. I do not see any evidence that require the recollection of the memory. Every debit to the account must be proved by the appellant and this, in the banking business, will have to be proved by documentary evidence. For example, if a debit is as a result of a cheques drawn on the account, the cheque will have to be proved unless otherwise provided under the agreement, like providing for the certificate of a bank officer to be sufficient proof of indebtedness.

Similarly, for other bills of exchange. I cannot imagine how any dispute which the respondent may raise regarding any sum allegedly owed by the respondent to the appellant would be dependent on oral evidence or on recollection of the memory. It was not pointed out at the lower Court what dispute and as regards what sums the resolution of which is dependent on oral as compared to documentary evidence. The respondent had alleged that whatever documents he had relating to this matter was lost to a fire but it was never shown or demonstrated to the Court below how such documents, whatever they were could be relevant to the question of the computation of the amount of indebtedness due from the respondent to the appellant. I do not see how such a bare assertion can constitute proof of serious prejudice. The long lapse of time alone in this case cannot be sufficient for the Court to conclude that there is a serious risk that

a fair trial is no longer possible because, as was said earlier, the evidence in this case will almost entirely be documentary which no passage of time can erase the record and which memory has no part to play in its production. If the documentary evidence cannot be produced, the party prejudiced would be the appellant, not the respondent. The learned Sessions Judge should, therefore, have found that there is no substance in the contention of'the respondent.

This appeal was heard on12 October 1994 but Mr. P.K. Lim, Counsel for the respondent, did not turn up for the hearing and he, through Miss Lucy Lo, conveyed the message that he has not been paid his legal fees and that he had already filed an application for his discharge. The respondent also did not appear. But I ordered that the hearing be proceeded with despite their absence because Mr. P.K. Lim, until the Court has made the order declaring he has, ceased to be the solicitor for the respondent, which the Court has not yet made, is, according to O. 11 r. 5(1) of the Subordinate Court Rules 1980, still the solicitor of the respondent till the final conclusion of this matter and he should have been present at the hearing but he chose not do. I do not see any reason for postponing the hearing just because the respondent and his advocate chose not to appear. Hence, the appeal was heard in their self-imposed absence.

The appeal is, for the reasons given, allowed. The order of the learned Sessions Judge striking out the summons against the respondent is set aside with costs to the appellant.